United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7234

To be argued by
THOMAS F. PARKER

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
2ND CIRCUIT

STANLEY V. TUCKER,

Plaintiff-Appellant,

v.

MECHANICS SAVINGS BANK, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLEE, MECHANICS SAVINGS BANK

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15 U.S.C. § 15b 1

BRIEF OF DEFENDANT-APPELLEE, MECHANICS SAVINGS BANK

Question Presented

Is a federal antitrust action started in November 1975 against a bank and its attorneys by a mortgagor alleging that the bank designated attorneys to do the required legal work at mortgagor's expense and which the mortgagor paid for at the mortgage closing in May 1969 and also based on the bank's not paying over the final advance of the mortgage proceeds when allegedly due in June 1970 barred by the statute of limitations.

Statement of the Case

Proceedings Below

This action was commenced by complaint filed with the clerk of the United States District Court for the District of Connecticut at Hartford on November 5, 1975. The original complaint was in two counts. The first count purported to state a cause of action under the federal antitrust laws. The second count restated the fact allegations of the first count and claimed to be based on the State of Connecticut's antitrust laws.

On May 5, 1976, the defendant Mechanics Savings Bank moved for judgment dismissing the complaint based upon the four-year federal antitrust statute of limitations, 15 U.S.C. § 15b. Thereafter, on May 10, 1976, and before any action had been taken thereon by the court, plaintiff moved for permission to amend his complaint. Plaintiff's proposed amendment was attached to the motion for permission to file the amendment. The amendment restated

in more expansive terms some allegations of the original complaint and also added a third count based on a contractual claim.

On November 18, 1976, the court granted the motion for leave to file an amendment to the complaint by endorsing on the original motion papers the following: "Granted—11-18-76. No additional answer or response is required. MJB USDJ."

On November 23, 1976, the court (Blumenfeld, J.) filed its "Ruling on Pending Motions." In that ruling, the court upheld the defendants' contention that the action of the federal antitrust laws was barred by the statute of limitations. The court refused to exercise pendent jurisdiction over the claims based on state law (Counts 2 and 3).

On December 10, 1976, plaintiff filed his "First Amended Complaint" claiming that the order of November 18 permitted him to do so. On December 15, 1976, judgment was actually entered dismissing the action based upon the court's prior ruling, i.e. based upon the actions being barred by the statute of limitations and the pendent claims for lack of jurisdiction. Thereafter plaintiff appealed from the judgment entered on December 15, 1976.

Facts

The requisite fact basis is relatively simple. In 1968, plaintiff requested the Mechanics Savings Bank to grant him a construction loan to build an apartment. [First Amended Complaint, ¶ 7, Plaintiff's Joint Appendix* p. B-3] After some negotiation, the Mechanics Savings Bank agreed to make such a loan in the amount of $64,000.

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* Plaintiff has filed a "Joint Appendix." It was prepared by plaintiff alone without any participation by the defendants. In this brief, reference may be made thereto and designated "Plaintiff's Joint Appendix" or abbreviated "P. Jt. App."

The loan terms and conditions were extensive. [Exhibit A to First Amended Complaint, P. Jt. App. p. B-13] The loan was to be secured by a mortgage on plaintiff's property located at 53 Hamilton Street, Hartford. Mechanics Savings Bank engaged the law firm of Gilman & Marks to handle the necessary legal work for it (Mechanics Savings Bank). Plaintiff was told that Gilman & Marks, attorneys were representing the Mechanics Savings Bank and that Gilman & Marks' charges had to be paid by the plaintiff. [First Amended Complaint, ¶¶ 10 and 19, P. Jt. App. pp. B-4 and B-7]

The mortgage loan closed on May 16, 1969. Plaintiff, by letter dated May 16, 1969, authorized Mechanics Savings Bank to pay Gilman & Marks for its charges from the loan proceeds. On May 19, 1969, Mechanics Savings Bank did in fact pay Gilman & Marks out of the loan proceeds. (See Bailey Affidavit, ¶¶ 4, 6 and 7 attached to Defendant Gilman & Marks' response to Plaintiff's Motion for Summary Judgment; also First Amended Complaint, ¶ 10, P. Jt. App. p. B-4; also see Loan Closing Statement, P. Jt. App. p. F-10.)

The mortgage proceeds were to be disbursed in installments, takedowns, or advances corresponding with stipulated steps in the progress of construction. [Exhibit A to First Amended Complaint, P. Jt. App. p. B-13] Under the terms and conditions of the loan agreement, the final $12,800 takedown had to be advanced by June 15, 1970. [Bailey Affidavit, ¶¶ 4, 6, 7; First Amended Complaint, ¶ 20, P. Jt. App. p. B-8; Plaintiff's Responses to the Mechanics Savings Bank Interrogatories #23, 38 and 41] Due to plaintiff's failure to meet certain conditions precedent therefor, the money was not disbursed to plaintiff. It has never been. [First Amnded Complaint, ¶¶ 14 and 23, P. Jt. App. pp. B-5 and B-9.]

ARGUMENT

Preliminary Statement

The judgment appealed from was based on the statute of limitations. Much of plaintiff's brief is addressed to the supposed merits of his antitrust action. To such extent it is irrelevant. The case never got to the point of consideration on the merits. The judgment was predicated solely on the statute of limitations. That issue alone is properly the subject of the appeal. Therefore, this brief is concerned mainly with the statute of limitations issue. The absence of discussion on any other allegation or claim should not be taken as even a tacit admission by this defendant that there is even a scintilla of merit to plaintiff's case.

The Statute of Limitations Was Correctly Invoked

The federal antitrust action is clearly barred by the statute of limitations. The nub of plaintiff's co[illegible] (the complaint is hardly the essence of clarity) app[illegible] be that the Mechanics Savings Bank and the law firm of Gilman & Marks had some illegal arrangement as to the performance of mortgage-related legal work and the setting of the fee for same. While it is hardly agreed that there is any substance to the plaintiff's allegations, it is clear that even if those allegations are correct, the operative events occurred before May 19, 1969. The mortgage closed on May 16, 1969. The payment of the attorneys' fees and expenses occurred on May 19, 1969 under specific written authority given the Mechanics Savings Bank by the plaintiff. Thus, payment, if it be improper or illegal in any way, occurred on that date, May 19, 1969. It was at that date that the act, if it be wrongful, was finally completed and had its impact on the plaintiff. Clearly, May 19, 1969 is more than four years before November 5, 1975 commencement of this suit.

The failure to pay over the final advance of $12,800 on June 15, 1970 is the second aspect of wrong-doing relied upon by plaintiff. He complains that the failure to pay him the final takedown of $12,800 was somehow an antitrust violation. Plaintiff claims this payment was due him by no later than June 15, 1970. The delict charged occurred (didn't occur) on June 15, 1970. Again, the alleged wrong and its impact on plaintiff were more than four years before the commencement of the action.

The applicable statute reads:

> "Any action to enforce any cause of action under Sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said actions." 15 U.S.C. § 15b.

The Supreme Court has defined the period of limitations in an antitrust action in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). In that action Hazeltine had brought a patent infringement action against Zenith. That action began in 1959. In 1963 Zenith filed an antitrust counterclaim. The trial court indicated it would allow damages to Zenith on its counterclaim. Part of these damages arose out of acts which occurred prior to 1959. Hazeltine then claimed that the damages from the pre-1959 acts were barred by the four-year statute of limitations. Hazeltine contended that the statute of limitations permitted "the recovery only of those damages caused by overt acts committed during the four-year period." The Supreme Court did not agree. It stated:

> "The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued,' 15 U.S.C. § 15b, plus any additional num-

ber of years during which the statute of limitations was tolled. Generally, *a cause of* action *accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.* . . . This much is plain from the treble-damage statute itself. 15 U.S.C. § 15. In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, *this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.* . . . However, each separate cause of action that so accrues entitled a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. . . . Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators of that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. . . ." [Citations omitted] (emphasis supplied) *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. at 338, 339.

This case is within the basic and general rule of the statute as enunciated by the Supreme Court in *Zenith.*

> "The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued,' 15 U.S.C. § 15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. at 338.

The defendant's acts were the supposed illegal forcing of plaintiff to pay Gilman & Marks' fee. This occurred at least by the date the fee was paid, May 19, 1969. The injury, if any, to plaintiff resulting from this act occurred when the plaintiff paid the bill, May 19, 1969. Thus the cause of action accrued and the statute of limitations began to run when the defendants forced plaintiff to pay the bill [the act occurred] and plaintiff did so pay it [when plaintiff was injured], May 19, 1969.

So too with the alleged wrongful withholding of the final advance plaintiff claims was due on or before June 15, 1970. The alleged wrong-doing occurred when the defendant Mechanics Savings Bank did not make the payment when it was due, June 15, 1970. The injury occurred when plaintiff didn't get the money when he should have, June 15, 1969. Again, this wrong and the injury occurred on or before June 15, 1970.

The acts claimed to have violated plaintiff's rights under the antitrust laws were decisive actions taken at one point in time. The alleged illegal fee arrangement from which plaintiff alleges he suffered occurred prior to May 19, 1969 and had its final impact upon him on May 19, 1969. So too, the failure to pay over the final advance of $12,800 supposedly due by no later than June 15, 1970 had its injurious effect on that date, June 15, 1970.

The plaintiff's cause of action accrued, and the statute of limitations began by no later than June 15, 1970. The action is time-barred.

Conspiracy, Fraudulent Concealment and *Zenith* Exceptions to Bar of Statute of Limitations Are Not Applicable

Plaintiff misplaces reliance on the so-called "conspiracy", "fraudulent concealment", and *"Zenith"* exceptions to the bar of the statute of limitations. In proper fact situations, the bar of the statute of limitations may be lifted. The requisite facts for any one of the exceptions are not present in the instant case.

There is law to the effect that the bar of the statute of limitations may be lifted in the case of a continuing conspiracy where overt acts in furtherance of the conspiracy have occurred within the four-year limitations period. Such is not the case here. Here the first alleged conspiratorial act and its result were completed on May 19, 1969 when the plaintiff was forced to pay the attorneys' bill. The other conspiratorial act and its impact were complete on June 15, 1970 when Mechanics Savings Bank withheld the final advance. No acts or injury have taken place since that time.

In *Poster Exchange, Inc.* v. *National Screen Service Corporation,* 517 F.2d 117 (5 Cir. 1975), the plaintiff alleged a continuing conspiracy which prevented his action being barred by the statute of limitations. The Court of Appeals for the Fifth Circuit set forth the criteria for a continuing conspiracy's preventing application of the statute of limitations.

> "Where the violation is final at its impact, for example, when the plaintiff's business is immediately and permanently destroyed, or where *an actionable wrong is by its nature permanent at initiation with-*

> *out further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitation period and upon the initial act.''* [Emphasis added] *Poster Exchange, Inc.* v. *National Screen Service Corporation,* 517 F.2d at 126.

That court also indicated that a critical determination is whether or not there has been a mere absence of dealing with the plaintiff or new acts actually causing injury. *Poster Exchange, Inc.* v. *National Screen Service Corporation, supra,* 128.

Plaintiff claims that overt acts in furtherance of the conspiracy have occurred which rejuvenate his cause of action. This court has clearly held that any overt acts which would toll the statute must have caused injury to the plaintiff.

> '' 'In the material submitted in opposition to the motion for summary judgment plaintiff failed to establish that there was any triable issue as to the occurrence within four years of the time the action was commenced of any overt act in furtherance of the alleged conspiracy.' '' *Peto* v. *Madison Square Garden Corp.,* 384 F.2d 682, 683 (2 Cir. 1967), cert. den. 390 U.S. 989 (1968), rehearing denied 390 U.S. 1046 (1968).

In *Peto,* a *per curiam order,* this court relied upon and adopted the rationale set forth in *Garelick* v. *Goerlich's, Inc.,* 323 F.2d 854 (1963). A proper understanding of the *Peto* case, therefore, necessitates discussion of the holding of the Court of Appeals for the Sixth Circuit. In *Garelick,* the plaintiff had been a distributor of the defendant's product prior to October 1, 1956. In September of 1956 defendant notified plaintiff it would cease doing business with plaintiff beginning in October 1956. After October 1, 1956 defendant did no more business with plaintiff.

Garelick instituted suit in January 1972. He claimed that two overt acts had occurred, one in Febuary 1959 and one in October 1961, which renewed his cause of action. The court stated:

> "All the authorities are in accord that a right of action for a civil conspiracy under the antitrust laws accrues from the commission of the *last overt act causing injury or damage.*" [Citations omitted] (Emphasis added) *Garelick* v. *Goerlich's, Inc.,* 323 F.2d at 854, 855.

The February 1959 overt act, was simply that plaintiff asked the defendant to reinstate him. Defendant said they would call upon him but never did. The October 1961 act was similar. A salesman for the defendant called upon the plaintiff suggesting plaintiff sell defendant's products. Plaintiff expressed surprise and told defendant's salesman he previously had been terminated. The salesman said he would check on this and get back to plaintiff. Nothing further occurred. The court held these acts not to be overt acts lifting the bar of the statute of limitations since neither act caused injury.

> "The conduct on these two occasions might be overt acts, but obviously the plaintiffs-appellants were not in any way injured or damaged thereby. The incidents were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiff." *Garelick* v. *Goerlich's Inc.,* 323 F.2d at 856.

The same situation obtains in the case at bar. No overt acts occurred within the four-year period which in any way caused a further injury to the plaintiff. The overt acts relied upon by plaintiff are described in the First Amended Complaint. It reads in part:

> "First Cause of Action
>
> 20. . . . That said conspiracy was a continuing one continuing even to this date and never repudiated by

any of the co-conspirators and that pursuant to said conspiracy the following overt acts were performed to cause injury to the Plaintiff:

a. On or before June 15th, 1970 Thomas A. Bailey in concealment and secrecy from Plaintiff issued to the Mechanics Savings Bank a legal opinion to prevent the release of the final $12,800 on grounds contrary to Connecticut General Statute 49-3

b. During the fall of 1970 Thomas A. Bailey again secretly confirmed said legal opinion to Mechanics Savings Bank

c. Based on said opinion on June 15, 1970 Mechanics Savings Bank refused to make the release of $12,800 and gave to Plaintiff a false and fraudulent reason

d. Plaintiff repeatedly demanded the release and was refused by the Mechanics Savings bank acting on basis of said legal opinion on June 15, 1970, on July 3, 1970, on October 9th, 1970, on June 10th, 1971, on January 12th, 1972, on March 15th, 1972 and on Sept. 19th, 1975."

Plaintiff's "Joint Appendix", p. B-8.

By his express allegations, the overt acts described in subparagraphs "a", "b", and "c" occurred on and or before June 15, 1970. As to those described in subparagraph "d", three (June 15, 1970, July 3, 1970, October 9, 1970, and June 10, 1971) occurred before the four-year limitation period.

The dates of the alleged overt acts of January 12, 1972, March 15, 1972 and September 19, 1975, are within the four-year period of limitations. But none of the acts caused plaintiff any injury. Those acts are exactly the same as those found not to renew *Garelick's* cause of action.

Plaintiff also claims that he may bring the action despite the statute of limitations because of a fraudulent concealment by the defendants. Again, the plaintiff's position is without merit. A fraudulent concealment may, in an appropriate case, toll the statute of limitations. This court has set forth the requirements.

> "In order to establish fraudulent concealment, a claimant must show: (1) that defendants concealed the basic facts that would reveal the existence of their monopolistic behavior, and (2) that plaintiffs were ignorant of those facts through no fault of their own." [citations omitted] *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448 (2 Cir. 1974)

In this case, it is clear that plaintiffs knew the existence of the basic facts. Plaintiff knew immediately that he had to pay for Gilman & Marks' fees and expenses. Similarly, he knew immediately when he was supposedly wrongfully denied his final advance. However, plaintiff seems to rely upon the fact that the attorneys rendered "an opinion" to their client, the bank, which was purposely erroneous to further the ends of the conspiracy. Plaintiff seems to be claiming that the failure to disclose the contents of a legal opinion of the attorneys to their client constitutes a fraudulent concealment. This position is without merit and is well-nigh absurd. A lawyer's opinion given a client is a privileged communication. The failure to disclose what may be privileged can hardly be the basis for a fraudulent concealment.

Plaintiff continually confuses the injury he supposedly sustained. The injury he allegedly sustained was a dollar amount determinable immediately. Thus, if the failure to pay over the $12,800 was an injury, the damages therefor were $12,800. So too, with the allegedly illegal fee. That portion alleged to be excessive was determinable and was determinable immediately. The other damages

plaintiff claims, i.e. what he might have been able to do with the $12,800 and the excessive part of the legal fee, are not legally recoverable as damages. At best, he could receive the legal rate of interest for any sums wrongfully kept from him. While these claimed damages are rash speculation, plaintiff's real damages, if any, were readily determinable from the very outset.

The facts here simply do not support the *Zenith* exception. In *Zenith,* when the wrongs were originally committed and their original impact felt by Hazeltine, the length, breadth and depth of the damages Hazeltine would suffer by its being excluded from the Canadian market could not be determined. Even the size of a free Canadian market could not be determined. Therefore, the court held that Hazeltine could not be barred from prosecuting an action when it could not prove damages because of the "speculative" nature at that time when the wrongful act occurred and had its impact on the plaintiff. But here, wrongful act and its impact occurred at the same time. Plaintiff's claimed damages are not, have never been, "speculative" in the *Zenith* sense.

Payment of Monthly Mortgage Payments Do Not Accrue New Cause of Action

Plaintiff also contends that because he is under a continuing obligation to make monthly payments under his mortgage, the statute of limitations begins to run each and every month. The cases relied upon by plaintiff are inapposite. In those cases the amount of each payment was alleged to be excessive by virtue of the wrongs proscribed by the antitrust laws. Here, however, there is not even an allegation that the monthly mortgage payments are in any way affected by, that is increased by, any of the alleged antitrust misconduct. Therefore, the statute of limitations is not rejuvenated monthly.

The Trial Court Did Consider The Amended Complaint

Plaintiff bemoans that the court (Blumenfeld, J.) improperly permitted judgment to enter despite the fact that the court had granted his request to file an Amendment to the Complaint. This complaint rings hollow. When plaintiff requested the permission to amend, he filed a "Motion for Leave to File Amendment to Complaint, Brief, And Proposed Amendment." The amendment plaintiff desired was attached to and a part of the papers. In his joint index, plaintiff cleverly, but not candidly, included only the motion but not the incorporated amendment. See Plaintiff's Joint Appendix, E-1. The court below did have the amendment before it. The court considered it. The court in its memorandum specifically mentioned the "plaintiff's complaint, as amended." See Plaintiff's Joint Appendix, p. D-1. The court's analysis of the effect of the amendment was the subject of a footnote.

> "1/ The amendment to the complaint is nothing more than a restatement of the same claims as set forth in the original complaint."
>
> Plaintiff's Joint Appendix, p. D-1.

Plaintiff's complaint that the court did not consider the amendment and/or did not consider it correctly is false and totally baseless.

Conclusion

It is respectfully submitted that plaintiff's action is time barred. No exception to the bar of the statute of limitations may be invoked. The judgment of the District Court dismissing the action should be affirmed.

Respectfully submitted,

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